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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 572

JAMES BUSH and REVA FINCHUM BUSH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

Petitioners, James Bush and Reva Finchum Bush, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on September 28, 1960, and the Order Denying Rehearing entered October 31, 1960.

CITATIONS TO OPINIONS BELOW.

The memorandum opinions of the United States District Court for the Eastern District of Tennessee, Northern Division, are unreported and are printed in the Certified Record (Appendix below) at page 58a to page 66a, of which nine additional copies are filed herewith. The Supplemental Opinion of the District Court is on pages 67a to 74a of the Certified Record. The Judgment of the Circuit Court of Appeals is printed at page 16, *infra*. The

opinion of the Circuit Court of Appeals is printed at page 10, *infra*. The certificate, duly authenticated by the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, is filed herewith.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Sixth Circuit was entered on the 28th day of September, 1960. (p. 16, *infra*.)

Rehearing was denied on the 31st day of October, 1960. (p. 16, *infra*.)

The jurisdiction of this Court is invoked under 28 U. S. C. section 1254.1 (and Rule 37 (b) (1), Federal Rules of Criminal Procedure).

QUESTIONS PRESENTED.

1. Did the Court of Appeals err in reversing the judgment and opinion of the District Court on petitioners' motion to suppress the evidence?

2. Did the Circuit Court of Appeals err in holding that an entry into the dwelling house of the petitioner, James Bush, a person suspected of crime, by means of previous deception or false representation was not unreasonable and does not violate the Fourth Amendment to the Constitution of the United States. This decision is in direct conflict with the decision of the Third Circuit Court case of *Fraternal Order of Eagles No. 778, Johnstown, Pennsylvania, et al. vs. United States*, 57 Fed. (2) page 93.

3. Did the Court of Appeals for the Sixth Circuit err in deciding a federal question of substance in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in the case of *Sommers et ux v. United States*, Circuit Court of Appeals, 138 Fed. (2) 790, when the 6th Circuit Court of Appeals held that conversations with the petitioner, Reva Finchum Bush, wife of James Bush, out of the presence of the husband, could and did afford the basis of an affidavit for the issuance of a legal and lawful search warrant to search the residence of the petitioner, James Bush.

4. Did the Court of Appeals err in holding in effect that the petitioner, Reva Finchum Bush, could and did waive the Constitutional rights of the petitioner, James Bush, when, after an illegal trespass had already been committed and after several minutes of persuasion including misrepresentations, etc., she extended an implied invitation to the officers and others who followed her into their dwelling house.

5. Did the Court of Appeals err when it decided an important question of federal law in a way probably in conflict with the applicable decisions of this Court and when its decision departed from the accepted and usual course sanctioned and followed in the various lower courts, the question being of general importance and of substance relating to the construction and/or application of the statutes of the United States and of the Constitution of the United States. The Court of Appeals for the Sixth Circuit did not cite an applicable decision of this Court and the question is of such importance as to call for an exercise of this Court's power of supervision.

CONSTITUTIONAL PROVISION INVOLVED.

The constitutional provision involved is the Fourth Amendment to the Constitution of the United States, which is as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

STATEMENT.

The petitioners and each of them were indicted on a four-count indictment charging a joint violation of 5008(b) of the Internal Revenue Code, on or about the 4th day of June, 1958.. The second count of the indictment charged them with violating section 5632 of the Internal Revenue Code on the same day. The third count of the indictment charged a violation of section 5008(b) on June 13, 1958, and the fourth count charged a violation of 5632, Internal Revenue Code on or about June 13, 1958. (Certified Record, page 59a.)

Petitioners filed a motion to suppress the evidence and to quash the indictment. The motion was based on seven grounds. Record pages 8a through 10a. Issue was joined and there was a hearing before the Court on the motion to suppress the evidence. (Record page 11a to 58a.)

At the hearing on December 12, 1958, the District Judge pronounced his finding of fact and conclusions of law, and on the same day filed a consolidated memorandum sustaining the motion of the defendants (petitioners) to suppress the evidence illegally obtained by the government within the jurisdiction of the District Court, and an order was entered to that effect. (Record pages 58a to 66a.) Thereafter, the United States Attorney moved the Court to reconsider his ruling upon motion and the motion was granted. (Record page 66a.) The cause was again briefed and reargued on April 23, 1959. Whereupon, the Court again reaffirmed his previous opinion and made and entered a supplemental opinion considering the further objections by the District Attorney, and the Court again sustained the motion of petitioners and made and entered an order to that effect. (Record pages 67a to 74a.)

At the instance of the District Attorney and upon representation in open court that the evidence obtained by reason of the search of petitioners' home by the officer on June 4, 1958, without a search warrant and the subsequent issuance of a search warrant on June 9, on the basis of what was seen on June 4th, 1958, was the only evidence presented to the Grand Jury and was the only evidence on which the Grand Jury acted in this cause. In order to remove any difficulty to an appeal by the government, the indictment was dismissed. (Record page 74a.)

The decisions of the Court below were based largely upon the authority set out in said opinions as same appear in the record. The Court did not, however, set out in the opinion, wholly, his findings of fact, with respect to the evidence offered, there being some conflicts in the testimony of the government's witnesses.

The facts amply sustain the opinion and conclusion of the District Court who observed the witnesses and heard the testimony in court, and his opinions fully appear in the Certified Record on Petition for Writ of Certiorari. (pages 58a-74a.) The opinion of the Court of Appeals is erroneous because the law and the facts are not as found by the Court in these particulars.

REASONS FOR GRANTING THE WRIT.

The decision of the Circuit Court of Appeals in the instant case is directly in conflict with the decision of the case of *Fraternal Order of Eagles No. 778, Johnstown, Pennsylvania v. United States*, 57 Fed. (2) 93, decided by the Third Circuit Court of Appeals.

The District Court found as a fact that the government agent entered the petitioners' premises in violation of their rights when he, along with his companions, drove his car into the driveway about forty feet and stopped. That he misrepresented his residence and occupation in conversation with the petitioner, Reva Finchum Bush, about the purchase of whiskey; that through this subterfuge he was able, along with the other two men, to get into the kitchen part of the house and he violated petitioners' Constitutional rights by entering their house by the methods indicated; that the information upon which the United States Commissioner issued the warrant was obtained in violation of the petitioners' Constitutional rights and, therefore, the search warrant based upon such violation of their rights was illegal. (Record, pages 65a and 66a.)

The district judge found the facts substantially identical to the cases of *United States v. Mitchneck*, 2 Fed. Supp. 225, and *Fraternal Order of Eagles No. 778, Johnstown, Pennsylvania v. United States*, 57 Fed. (2) 93. Furthermore, his decision is in accordance with and has the support of many decisions, both of the district courts and of the Supreme Court which are cited and discussed in the two opinions of the Court on petitioners' motion to suppress the evidence. (Record pages 58a through 66a and the supplemental opinion, pages 67a through 74a.)

The Court of Appeals reversed the judgment of the District Court. (*Infra*, pp. 10 to 16.) The Court of Ap-

peals, in overruling petitioners' request for rehearing, erroneously failed to consider that the statement or affidavit in the search warrant was based almost wholly on the conversation with Petitioner, Reva Finchum Bush, inside and outside of the house, and in the absence of the petitioner, James Bush, the search warrant being for the James Bush residence.

On the proven facts, the decision of the District Court was manifestly correct. There is no asserted conflict of decision in the light of the history of the Fourth Amendment, nor could any other result be reached unless there be a change in the interpretation and application of the provisions of the Fourth Amendment on the many important decisions on questions of federal law by this Court.

The decision of the Court of Appeals is believed to be erroneous in the view that the only misrepresentation was that the agent hid his identity as an officer and posed as a member of the general public, and erroneously failed to consider that the officer misrepresented that they had been to petitioners' home previously; or that he had misrepresented his residence, his occupation, and further stated they wanted to purchase the whiskey for a party, etc., these being conversations with petitioner, Reva Finchum Bush, and not with the petitioner, James Bush, all of which more fully appears in a certified record.

It was an error prejudicial to the rights of each of these petitioners for the Sixth Circuit Court of Appeals to reverse the findings of the District Court and to order the case back to the District Court for a new trial, and for the admission of this illegal evidence in court against each of the petitioners.

In the opinion of the Sixth Circuit Court of Appeals in the instant case their position is that even though the curtilege about the home is trespassed upon by the federal officer and by means of false representations to the peti-

tioner, Reva Finchum Bush, the wife, he assumes an invitation to go on into the kitchen part of the house and does so, and that if, in so doing, he discovers a violation of the law, then the illegality of the trespass ceases to exist and such alleged facts are competent to be proved in Court. This view makes many fundamental changes in the law as set out in the Fourth Amendment and interpreted by the Court.

It is well settled and fundamental that an illegal search or entry is not made legal by what is discovered, and a review of the decisions of all the courts clearly indicate the above understanding of the Fourth Amendment. To hold otherwise is to contribute to an encroachment upon the rights of the individual citizen as defined in the Bill of Rights and in the Fourth Amendment.

This is the first application for a writ of certiorari in this case.

CONCLUSION.

For the foregoing reasons this petition for writ of certiorari should be granted. That this case be placed upon the docket of this Court for argument and that the judgment of the Court of Appeals reversing the judgment of the District Court be reviewed and reversed, and the errors complained of be corrected.

Respectfully submitted,

JAMES BUSH,
REVA FINCHUM BUSH,
Petitioners,
By: HOBART F. ATKINS,
410 Cumberland Ave., S. W.,
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Counsel for Petitioners.

APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided September 28, 1960.)

Before McALLISTER, Chief Judge, THORNTON and KENT, District Judges.

McALLISTER, Chief Judge. The government appeals from an order of the District Court sustaining appellees' motion to suppress evidence, on the ground that it was illegally obtained, in a prosecution for possession and concealment of non-tax-paid whiskey, in violation of Title 26, U. S. C. A., Section 5008(b), and Section 5632.

The facts are as follows: On June 4, 1958, Raymond Hahn, a Federal Alcohol Tax Officer from Chattanooga, Tennessee, proceeded to a beer tavern in Knoxville, Tennessee, accompanied by an informant, and there met Willie Yates, who agreed to go with them to the residence of James Bush and Reva Bush, his wife, in Sevier County, Tennessee, for the purpose of purchasing moonshine whiskey. Upon their arrival at the Bush home, Investigator Hahn, accompanied by Yates and the informant, drove into the driveway of the Bush premises, a distance of about forty feet from the street, and stopped in front of the garage on the property. Mr. Bush was standing in the yard at the time, about six feet from where the car stopped. He was alone, and Yates started a casual conversation with him, afterward telling him that they had come to buy liquor. Bush replied that he did not handle liquor; that he did not have any; and that he did not know the three men. Shortly afterward Mrs. Bush came along and Bush "wandered off to the side," but stayed within hearing distance while they talked to Mrs. Bush for a few minutes. Yates tried to make Mrs. Bush believe that she

knew him, and told her names of people "he was kin to"; but she did not recognize him, and after thoroughly questioning him, could not recall his ever having been at her home, or who he was. She then went onto the porch and into the kitchen of the house. Shortly afterward, she came back and questioned them again as to the people they knew. They apparently did not satisfy her as to their having mutual acquaintances, but in the course of their talk, they told her that they wanted the liquor for their own use, for a party. After a conversation of perhaps ten minutes at the back of the house, she finally said: "I will show you what I have got," and invited Investigator Hahn into the kitchen, the other men following. They all went in through the back porch, which was glassed in, and went into the kitchen. Mrs. Bush then reached up in a closet and removed two one-half gallon jars. One of them had a white liquid in it, and the other, a colored liquid; and she set them on the sink, and took the tops off.

Investigator Hahn said that each of the two jars was about half full; that he sampled the first one, which was white whiskey, and the second one, which was colored, and thereafter told her that they wanted approximately a case. She informed them that the white whiskey was $30.00 a case and the colored, which was aged whiskey, was $40.00 a case; but she told them that because she was not personally acquainted with any of them, she was afraid to sell it; and that they would have to bring somebody back whom she knew before she would sell them the whiskey. They were there about thirty minutes.

Five days later, on June 9, 1958, Investigator Hahn returned with the informer, and engaged in another long conversation with Mrs. Bush in an effort to buy whiskey from her. There was the same futile endeavor to persuade her that she should sell them the whiskey, and the mention

of people whom they both knew. She, however, stated that her husband had become angry with her for showing them the whiskey the first time they were there, and, accordingly, she refused to sell to them.

On June 9, 1958, Hahn executed an affidavit for a search warrant reciting the facts as to what he had observed on his first visit in the Bush home on June 4; a search warrant was, thereafter, issued, on this affidavit, on June 9; and, on June 13, Investigator Griffin and other officers executed it, and found approximately 9½ gallons of non-tax-paid whiskey in appellees' home. The District Court, on motion of appellees' counsel, sustained the motion to suppress the evidence, on the ground that it was illegally obtained as a result of information secured while trespassing on appellees' property on June 4. It was held that the search and seizure were made following entry of the Bush home by means of fraud and stealth, and that such a search and seizure were unreasonable and in violation of the Fourth Amendment. *United States v. Mitchneck*, 2 F. Supp. 225 (D. C. Pa.), *United States v. Reckis, et al.*, 119 F. Supp. 687 (D. C. Mass.), and that a search and seizure based on information secured through an entry gained by false misrepresentations are illegal. *Fraternal Order of Eagles, etc. v. United States*, 57 F. 2d 93 (C. C. A. 3).

It is the claim of appellees that the information upon which the search warrant was based was obtained by unlawful search; and it is the rule that where such information has been obtained through use of some element of force or coercion, actual, threatened, or implied, a search or seizure based thereon is unreasonable, and in violation of the Fourth Amendment, which is directed against unreasonable searches and seizures; and it has been held that an entrance by stealth upon a person's property is equiva-

lent to an entrance by force and, therefore, unreasonable.

However, the distinction has been drawn between a search warrant obtained as a result of information secured through force, coercion and stealth, and one obtained by an officer's concealment of his identity, and his posing as a member of the general public.

Investigator Hahn, in his conversation with Mrs. Bush, told her his name was Ray, which was true since his full name was Raymond Hahn; and he further told her that he worked in a foundry in Knoxville—which was not true.

The issue, therefore, is whether Investigator Hahn was such a trespasser on appellee's property, and, by misrepresentation, gained access to her home by such stealth, as to render the search unreasonable, and the search warrant void. Many misrepresentations as to the identity of the person making a search have presented close questions as appears from the language used in various opinions of the Supreme Court and other federal courts. Thus, where officers pose as members of a lodge to gain access to premises, or where a federal agent pretended to be a repairman for a still, it was held that access was gained by stealth, and that the searches were unreasonable. *Fraternal Order of Eagles No. 778, Johnstown, Pa. v. United States*, 57 F. 2d 93 (C. C. A. 3); and *United States v. Reckis*, 119 F. Supp. 687 (D. C. Mass.). To like effect is *United States v. Mitchneck*, 2 F. Supp. 225 (D. C. Pa.), where officers posed as refrigerator salesmen, represented that they had mutual acquaintances, and produced a fictitious note purportedly signed by a former employer of the defendant, stating that the officers were his friends. In *Gouled v. United States*, 255 U. S. 298, it appeared that a private in the Army, acting under direction of an officer in the Intelligence Department of the Army, went to defendant's office, pretending to make a friendly call on the defendant,

gained admission to his office, and in his absence and without his knowledge, stole and removed several documents. The Supreme Court held that the entrance was made by stealth, equivalent to an entrance by force and ruled that the documents were inadmissible because obtained in violation of the Fourth Amendment, stating, in its opinion, that "whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the government of the United States, by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, *any search and seizure subsequently and secretly made in his absence,* falls within the scope of the prohibition of the Fourth Amendment, * * *." (Emphasis supplied.) In *Wakkuri v. United States*, 67 F. 2d 844 (C. C. A. 6), where government agents, after receiving a complaint that defendant was violating the Prohibition Act, and after smelling the odors of cooking mash emanating from his bathhouse, drove upon his premises, and while inside the curtilage, and without a warrant, knocked on the door of the bathhouse, which was opened by defendant, resulting in the finding of a still, the court held the search in violation of the Fourth Amendment.

However, we consider that the foregoing authorities do not govern the instant case. Here, it is true, the government agent was a trespasser in the sense that he drove into the driveway of appellee's premises. In like manner he would be a trespasser if he approached appellee's front door and stood on his porch, ringing the doorbell. Whatever his status, as he drove into the driveway and stood on appellee's premises, he secured no information upon which the warrant was based until he was told by Mrs. Bush, in replying to his request to buy liquor, that she would show him what she had, and "motioned" him into

her kitchen. This appears clearly to have been an invitation by Mrs. Bush to come into the house.

As to misrepresentations made to Mrs. Bush, we are of the view that the only misrepresentation was that the agent hid his identity as an officer and posed as a member of the general public. Evidence obtained by law enforcement officers, using the subterfuge of hiding their identity in order to pose as members of the general public, has consistently been held to be admissible. *United States v. On Lee*, 193 F. 2d 306 (C. A. 2); *United States v. Smith*, 43 F. 2d 173 (D. C. Texas); *Purifoy v. United States*, 170 F. 2d 144 (C. C. A. 5). In the instant case, as in *United States v. Smith, supra*, and *Purifoy v. United States, supra*, the defendant invited the officer into the house and displayed the liquor. We cannot view the action of the government agent in this case as an unlawful trespass, securing entry by stealth, and resulting in an illegal search. In such important questions relating to the protection of a citizen against unreasonable searches and seizures, we give great heed to the views expressed in the opinion of the careful and experienced trial judge in this case, holding that the search violated constitutional guaranties. However, we are of the opinion that the warrant issued to search the Bush premises was lawful, and, accordingly, the judgment of the District Court is reversed and the case remanded for a new trial.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(September 28, 1960.)

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded to the District Court for a new trial.

Approved for entry:

/s/ THOMAS F. MCALLISTER
United States Circuit Judge

ORDER DENYING REHEARING.

(October 31, 1960.)

In their petition for rehearing, appellees, among other matters, stress the claim of waiver by Reve Finchum Bush of her husband's constitutional rights in inviting the government officer into their dwelling house where the whiskey was first seen, and later seized. It appeared from the evidence that when the officer first went to appellees' home, no search or seizure was made. When the officer approached the house, Mr. Bush was standing in the yard. At that time in answer to their questions, Mr. Bush told the officer and the two men who accompanied him that he did not handle liquor, and did not have any. When Mrs. Bush joined the group, her husband wandered off to the side, but remained within hearing distance while the men

talked to Mrs. Bush. Later, she went into the kitchen, returned, further questioned the men as to the different people they knew, and finally stated that she would show them what she had, and invited the officer into the kitchen, the other men following. There she removed two half gallons of whiskey from a closet, placed them on the sink, and removed the tops. After she had let them sample the whiskey and had told them the price per case, she went outside and conferred with her husband while the others remained in the kitchen. The evidence used in obtaining the search warrant resulted from this visit of the officer to appellees' kitchen. No objection was made by Mr. Bush to the officer's entering the kitchen, or to his remaining there, while Mrs. Bush went outside to confer with him. From the record before us, there was no waiver by the wife of her husband's constitutional rights. The later search by virtue of the warrant was lawful.

Appellees' petition for rehearing is denied.

Approved for entry:

/s/ THOMAS F. MCALLISTER
United States Circuit Judge

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JAMES BUSH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 572

JAMES BUSH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petition for a writ of certiorari is out of time. The judgment of the court of appeals (which reversed an order of the district court dismissing an indictment on the ground that it was based on evidence improperly obtained)[1] was entered on September 28, 1960. A petition for rehearing was denied on October 31, 1960. The petition for a writ of certiorari was not filed until December 8, 1960, more than 30 days

[1] The opinion of the court below states that the government's appeal was from an order sustaining a motion to suppress. While suppression was granted by the district court, the appeal was under 18 U.S.C. 3731 from the order dismissing the indictment. See *United States* v. *Ashby*, 245 F. 2d 684 (C.A. 5); *United States* v. *Sugden*, 226 F. 2d 281 (C.A. 9), affirmed, 351 U.S. 916.

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after the denial of rehearing. The petition, which seeks review of an order in a criminal case, is therefore out of time under Rule 22(2) of the Rules of this Court.

There is no occasion for this Court to waive its rules in this case. The effect of the reversal by the court of appeals is to reinstate the indictment and permit the case to go to trial. If petitioners are convicted, they may appeal from the final judgment, and, if the issue survives, bring it before this Court after there has been a review of the final judgment.

Moreover, the judgment of the court below is correct. As appears from the opinion below, the question at issue is whether the information on the basis of which a government investigator obtained a search warrant had been improperly obtained in that the government agent was invited into petitioner's house (where he thereafter saw whiskey) after one of his companions tried to persuade Mrs. Bush that she knew him and that they had friends in common. The court below was of the view that the subterfuge of the officer in hiding his identity as an officer and posing as a member of the general public was not the kind of misrepresentation which would render the entry unlawful. The ruling that officers may properly conceal their identity as such, without rendering evidence obtained thereby inadmissible, is supported by this Court's decision in *On Lee* v. *United States*, 343 U.S. 747, where the Court rejected an argument that the evidence should be held inadmissible because the informer induced admissions while posing as a friend.

Here, the officer, posing as a member of the general public, used only such persuasion as an ordinary purchaser would use.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

DECEMBER 1960.

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